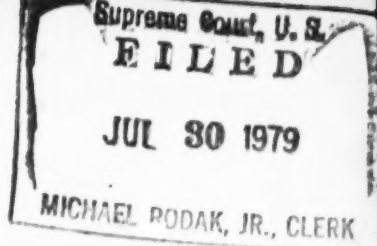


79-141

NO. _____



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

WAY BAKING COMPANY,

Petitioner,

v.

INTERSTATE BRANDS CORPORATION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
MICHIGAN SUPREME COURT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, Way Baking Company, respectfully asks this Court to issue a writ of certiorari to review the decision of the Michigan Supreme Court rendered in these proceedings on October 2, 1978. Petitioner is a baker of consumer products sold under the "Holsum" label. Respondent Interstate Brands Corporation attempted to enjoin petitioner from selling its "Holsum" bakery products in the Lansing, Michigan market, but the trial court and Michigan Court of Appeals ruled in favor of petitioner. The Michigan Supreme Court decision, reversing the judgments of the lower courts and directing the entry of an injunctive order, prevents petitioner from using its "Holsum" trademark in the Lansing market territory, thereby depriving petitioner of a major market for its product without due process of law. The decision also has an adverse effect on consumers because it limits competition in the market.

OPINIONS BELOW

Michigan Supreme Court. The judgment of the Michigan Supreme Court in this case (Appendix A, *infra*, p. 1a) is reported at 403 Mich. 479, 270 N.W. 2d 103 (1978).

The order of the Michigan Supreme Court denying petitioner's Motion for Rehearing (Appendix B, *infra*, p. 6a) was not reported.

The order of the Michigan Supreme Court denying petitioner's Motion for Clarification (Appendix C, *infra*, p. 7a) was not reported.

Michigan Court of Appeals. The judgment of the Michigan Court of Appeals affirming the judgment of the Jackson County Circuit Court in favor of petitioner (Appendix D, *infra*, p. 8a) is reported at 79 Mich. App. 551, 261 N.W. 2d 84 (1977).

Jackson County Circuit Court. The opinion (Appendix E, *infra*, p. 13a) and judgment (Appendix F, *infra*, p. 16a) of the Jackson County Circuit Court in favor of petitioner were not reported.

The judgment of the Jackson County Circuit Court on remand from the Michigan Supreme Court upon denial of petitioner's Motion for Clarification (Appendix G, *infra*, p. 18a) was not reported.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on October 2, 1978. Petitioner's timely Motion for Rehearing was denied on November 21, 1978. Petitioner's Motion for Clarification was denied on May 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Upon the evidence presented at the bench trial of this action before the Circuit Court of Jackson County, Michigan the court ruled in favor of petitioner Way Baking Company, denying respondent Interstate Brands Corporation injunctive and other relief on the grounds (i) that respondent had abandoned the trademark "Holsum" in the applicable trade territory and (ii) that respondent's use of the trademark in

the trade territory was defensive and for the purpose of stifling competition. The Michigan Court of Appeals affirmed the trial court's decision. Respondent filed an untimely Delayed Application for Leave to Appeal to the Michigan Supreme Court. Purporting to act pursuant to Michigan General Court Rule 853.2 (4), in lieu of granting leave to appeal the Michigan Supreme Court reversed, without oral argument, the judgments of the lower courts on the grounds that respondent had not abandoned the "Holsum" trademark. The questions presented are:

- I. Did the Michigan Supreme Court violate petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution by rendering a decision on the merits reversing the lower courts without giving petitioner notice that a decision on the merits could be rendered on respondent's Delayed Application for Leave to Appeal?
- II. Did the Michigan Supreme Court violate petitioner's rights under the Due Process Clause by depriving petitioner of the opportunity for oral argument before rendering a decision on the merits reversing factual findings of the lower courts?
- III. Did the Michigan Supreme Court violate petitioner's rights under the Due Process Clause by improperly applying the law and erroneously reversing the lower courts without giving consideration to the case as it was tried and as the issues were determined by the trial court?

CONSTITUTION PROVISIONS AND COURT RULES INVOLVED

Constitution of the United States, Amendment XIV, § 1:

"...nor shall any state deprive any person of life, liberty, or property without due process of law... ."

Michigan General Court Rules of 1963, Rule 853: Paragraph 853.1:

"Grounds: Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals...upon a showing of a meritorious basis for appeal and any one of the following grounds..."

Sub-paragraph 853.2 (3):

"Delayed application for leave to appeal may be filed upon a showing by affidavit of facts that the delay was not due to appellant's culpable negligence..."

Sub-paragraph 853.2 (4):

"Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order."

STATEMENT OF THE CASE

Respondent commenced this action in February, 1974 in the Circuit Court for Jackson County, Michigan, alleging that petitioner infringed respondent's "Holsum" trademark rights in the Lansing, Michigan market area. After a full non-jury trial on the merits, the Jackson County Circuit Court Judge issued his opinion and a judgment was entered dismissing respondent's complaint and denying injunctive relief. The judgment made two distinct and independent findings:

1. That respondent had abandoned the trademark "Holsum" in the trade territory.
2. That respondent's use of the trademark "Holsum" in the trade territory had been defensive and for the purpose of stifling competition.

The judgment affirmed and protected petitioner's right to sell its product under its "Holsum" trademark in the Lansing area, which is a major market for petitioner. The judgment

also informed respondent that the court would not sanction respondent's use of the trademark in a manner intended to eliminate market competition from petitioner.

Respondent appealed the trial court's judgment. On November 9, 1977 the Michigan Court of Appeals, after full briefing and oral argument, issued an opinion and order affirming the trial court.

Respondent then filed with the Michigan Supreme Court a Delayed Application for Leave to Appeal. In that pleading respondent argued that it was not guilty of culpable negligence in failing to file a timely Application for Leave to Appeal, and that leave to appeal should therefore be granted. Respondent also argued on the merits that the facts presented to the trial court did not support a finding that respondent had abandoned its trademark in the Lansing trade territory. Respondent did not present to the Supreme Court the issue whether defensive use of a trademark to stifle competition bars a court from granting the equitable relief of an injunction, regardless of a finding of abandonment.

Purporting to act pursuant to Michigan General Court Rule 853.2 (4), on October 2, 1978 the Michigan Supreme Court, without oral argument or a full brief by petitioner on the record below, decided the case on the merits upon respondent's Delayed Application for Leave to Appeal, holding that the evidence presented to the trial court did not support a finding of abandonment. The Michigan Supreme Court reversed the judgments of the lower courts and remanded the case to the Jackson County Circuit Court for entry of a judgment in conformity with its opinion.

The Michigan Supreme Court did not purport to reverse the trial court's finding that respondent's use of the "Holsum" trademark was for the purpose of stifling competition from petitioner. The court gave no consideration, apart from the issue of abandonment, to whether respondent's improper use of the trademark prevents a court from granting equitable relief. The effect of the court's decision was to deprive petitioner of a major market for its "Holsum" products.

Petitioner filed a timely Motion for Rehearing, arguing, *inter alia*, that in rendering its judgment the Michigan Supreme Court violated petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. As stated in Petitioner's Brief in Support of Motion for Rehearing before the Michigan Supreme Court:

"This Court's failure to provide the parties with an opportunity for oral argument or to give notice to the parties prior to reaching a decision on the merits without oral argument violated [petitioner's] rights under the...United States Constitution."

By order dated November 21, 1978, petitioner's Motion for Rehearing was denied without discussion of the federal constitutional questions.

On January 16, 1979 the trial court certified petitioner's Motion for Clarification to the Michigan Supreme Court, agreeing that the Michigan Supreme Court's opinion of October 2, 1978 was ambiguous and unclear because it did not deal with two dispositive issues:

1. Is a purely defensive use of a trademark grounds for denial of the equitable remedy of injunctive relief because a court of equity will not sanction by injunction use of a trademark in a defensive manner to stifle competition?
2. Was respondent's use of the Holsum trademark purely defensive to stifle competition?

By order dated May 2, 1979 petitioner's Motion for Clarification was denied by the Michigan Supreme Court and the Jackson County Circuit Court was directed to enter a judgment in favor of respondent, including an order enjoining petitioner from using the "Holsum" trademark in the Lansing trade territory. The Michigan Supreme Court's order did not discuss the issues certified to it by the trial court. On May 18, 1979, the Jackson County Circuit Court entered a judgment enjoining petitioner from using the "Holsum" trademark in the Lansing trade territory.

REASONS FOR GRANTING THE WRIT

The decision below violates petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution, in direct conflict with applicable decisions of this Court.

Introduction

This Court has consistently held that notice and an opportunity for a fair hearing must be accorded before property rights are taken or abrogated by the state. That is the procedural due process guaranteed by the United States Constitution. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972), reh. den. 409 U.S. 902 (1972).

The Michigan Supreme Court has deprived petitioner of vested and valuable property rights without giving petitioner notice and an opportunity to be heard, violating petitioner's due process rights.

The right to be heard exists to insure abstract fair play. More importantly, its purpose is to minimize substantively unfair or mistaken deprivations of property (*id.* at 81). The Michigan Supreme Court's decision was made without giving consideration to the issues as they were presented to and determined by the lower courts. That type of arbitrary decision is precisely what the fair hearing requirement is designed to prevent, and such a decision will not be tolerated under the United States Constitution.

The effects of the Michigan Supreme Court's improper reversal of the lower courts are:

- (i) to deny petitioner basic constitutional rights;
- (ii) to increase the risk of erroneous decisions on substantive issues, fostering undesirable legal precedents;
- (iii) to compromise the quality of legal services by making the task of the attorney in advising his client as to the risks of litigation difficult if not impossible; and
- (iv) to demean the system of justice, engendering disrespect for the law.

I. Petitioner's due process rights were violated in that the Michigan General Court Rules did not give petitioner adequate notice and an opportunity to be heard by the Michigan Supreme Court prior to its decision on the merits on respondent's Delayed Application for Leave to Appeal.

A. The Michigan General Court Rules were not intended to authorize the Michigan Supreme Court to render summary decisions in cases like the instant.

In reversing the lower courts upon being presented with respondent's Delayed Application for Leave to Appeal, the Michigan Supreme Court purported to act pursuant to Michigan General Court Rule 853.2 (4) which provides as follows:

"Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order."

That provision was not intended, and was not understood by those involved in its drafting, to allow the court summarily to overturn findings of fact and reverse lower court decisions except under the most unusual circumstances. As stated by one commentator who served on the Joint Committee involved in drafting the Michigan General Court Rules (see 1 Honigman & Hawkins, *Michigan Court Rules Annotated*, at III [2ed. 1962]):

"Of course, such peremptory power will be exercised sparingly and only in those cases in which it is quite clear on the face of the application for leave to appeal that the disposition of the case will be controlled by settled legal principles." 6 Honigman & Hawkins, *Michigan Court Rules Annotated* at 256 (2d ed. 1972).

The issues presented to the Michigan Supreme Court involved disputes of fact and law. The factual issues were whether the evidence presented at the trial supported the trial court's findings that respondent had abandoned the "Holsum" trademark and that respondent's use of the trademark was purely defensive. The legal issue was whether a purely defensive use by respondent prevented the trial court from granting it the equitable remedy of an injunction. The issues were not appropriate for resolution pursuant to the court's peremptory power to render a summary decision. For the Michigan Supreme Court to take such unpredictable action under a suddenly expansive interpretation of its authority under the Michigan General Court Rules deprived petitioner of the notice and opportunity to be heard which is an essential element of the due process which must be accorded when a state establishes avenues of appellate review. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Cole v. State of Arkansas*, 333 U.S. 196 (1948).

B. The Michigan General Court Rules do not authorize the Michigan Supreme Court to render summary decisions upon Delayed Applications for Leave to Appeal.

Petitioner was also deprived of notice and an opportunity to be heard because of the ambiguity of Michigan General Court Rule 853 regarding the Supreme Court's authority to render summary decisions. Rule 853 governs appeals to the Supreme Court from decisions of the Court of Appeals. It specifies the grounds which must be established in order to obtain leave to appeal, which is discretionary with the court. Those grounds are presented to the court through Applications for Leave to Appeal.

With respect to untimely Applications for Leave to Appeal, Michigan General Court Rule 853.2 (3) provides as follows:

"Delayed application for leave to appeal may be filed upon a showing by affidavit of facts that the delay was not due to appellant's culpable negligence but no such application shall be filed later than six months after the decision of the Court of Appeals."

Thus, when confronted with a Delayed Application for Leave to Appeal the Supreme Court must engage in a two-step decisional process. It must determine as a threshold matter whether the delay in filing the Application for Leave to Appeal is excusable, and it also must determine whether the appeal itself appears to have a meritorious basis.

The court's authority under Rule 853.2 (4) to render summary decisions on the merits on Applications for Leave to Appeal does not expressly extend to Delayed Applications for Leave to Appeal. A party involved in an appeal could quite reasonably interpret Rule 853 as not authorizing the court to render a summary decision on the merits when presented with a Delayed Application for Leave to Appeal. Rule 853 contains no cross reference between the sub-section dealing with Delayed Applications for Leave to Appeal and that dealing with summary decisions on Applications for Leave to Appeal. The sub-section permitting summary decisions does not expressly apply to Delayed Applications for Leave to Appeal. And because the court's decision on a Delayed Application for Leave to Appeal is a two-step process and presents an additional threshold issue for the appellee to deal with, it is logical to conclude that the Rule 853 as adopted did not contemplate summary decisions on Delayed Applications for Leave to Appeal.

Even assuming Michigan General Court Rule 853 does not absolutely prohibit summary decisions on Delayed Applications for Leave to Appeal, it is at best ambiguous on this point. This Court has held that in order to afford meaningful opportunity to be heard, notice must clearly and completely inform the person whose property rights are at stake of the procedures which will be followed. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). In that case this Court held that a notice to utility customers stating that payment of the utility bill was overdue and that service would be discontinued if payment was not made by a certain date, was not reasonably calculated to inform the customers of the procedures for protesting the proposed termination. The customers were held to have been deprived of their due process rights.

Likewise in the instant case Michigan General Court Rule 853 is not reasonably calculated to put parties on notice of the summary procedures the Michigan Supreme Court believes itself authorized to follow when presented with a Delayed Application for Leave to Appeal. Because those summary procedures foreclosed petitioner's opportunity to present fully its arguments on the merits, the Michigan Supreme Court's judgment reversing the lower courts deprived petitioner of substantial property rights without due process of law.

II. Petitioner's due process rights were violated in that the Michigan Supreme Court deprived petitioner of substantial property rights without according it the right to present oral argument on factual issues.

As the foregoing demonstrates, petitioner was deprived of adequate notice and opportunity to be heard before the Michigan Supreme Court, as a result of ambiguous General Court Rules which did not put petitioner on notice that the lower court decisions could be suddenly reversed without according petitioner an opportunity fully to present its arguments. But even assuming that the General Court Rules are not considered ambiguous and that petitioner is deemed to have had ample notice that a summary judgment could be rendered against it, under the circumstances of this case to deprive petitioner of oral argument before the Michigan Supreme Court violated petitioner's Fourteenth Amendment Due Process rights.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), payments to New York City welfare recipients were being terminated without a pretermination evidentiary hearing. The welfare recipients were given notice and an opportunity to present a written statement of objection prior to termination of benefits. The procedure was challenged because recipients were not given an opportunity to make a personal appearance at a pre-termination hearing.

This Court noted that the extent to which procedural due process must be afforded the recipients "depends upon whether the recipients' interest in avoiding the loss outweighs the

governmental interest in summary adjudication" (*id.* at 397 U.S. 263). This Court relied upon the essential character of welfare benefits to recipients in holding that due process requires that a recipient be accorded timely and adequate notice detailing the reasons for proposed termination, and "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (*id.* at 397 U.S. 268). This Court was not persuaded by the argument that the welfare recipients' interests were outweighed by a countervailing governmental interest in conserving fiscal and administrative resources.

The *Goldberg* case bears a striking resemblance to the case now before this Court. Petitioner's substantial property interest in its "Holsum" trademark and its right to use that trademark in the Lansing trade territory were confirmed and protected by the Jackson County Circuit Court and the Michigan Court of Appeals. The decisions of those courts turned, in part, upon factual issues. Respondent was found to have abandoned the trademark in the trade territory and respondent's use of the trademark in the territory was found to have been defensive resulting in a forfeiture of any claim respondent might have had to an injunction. Those decisions affirmed petitioner's vested property right in the "Holsum" trademark for use in the Lansing trade territory. The decisions affirming that vested right were subject only to proper review by the Michigan Supreme Court in accordance with due process standards.

The Michigan Supreme Court reversed the factual findings of the lower courts without according petitioner an opportunity to present oral argument. This Court noted in its *Goldberg* decision that the right to oral argument is important in cases where the party whose property interests have been terminated has "challenged [that termination] as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases" (*id.* at 397 U.S. 268). Under this Court's decision in *Goldberg*, it was a gross violation of due process for the Michigan Supreme Court

to reverse the lower court decisions without first according petitioner the right to present oral argument.

III. The Michigan Supreme Court violated petitioner's due process rights by improperly applying the law and erroneously reversing the lower courts without giving consideration to the case as it was tried and as the issues were determined by the trial court.

The Jackson County Circuit Court's judgment in favor of petitioner rested on two grounds:

1. Respondent had abandoned the trademark Holsum in the trade territory;
2. Respondent's use of the trademark Holsum in the trade territory was defensive and for the purpose of stifling competition.

In its opinion the trial court stated at page 3 (Appendix E, *infra.*, p. 15a):

"...[It] is the further finding of the Court that the use by plaintiff of the trade name Holsum in the Lansing market area was a defensive competitive measure in order to stifle competition from the defendant. This tactic will not be sanctioned and protected by injunctive relief in a Court of equity. The Court is persuaded to such conclusion by the following cases: *La Societe Anonyme Parfums le Galion v Jean Patou, Inc.*, 181 USPQ 545 (2 Cir, 1974); *United Drug Company v Theodore Rectanus Company*, 248 US 90 (1918); *Morton Salt Company v G S Suppiger Company*, 314 US 488 (1941)."

The trial court also remarked at page 2 (Appendix E, *infra.*, p. 14a) of its opinion:

"...[There] is undisputed evidence that, since taking over Roskam, plaintiff has been phasing out completely the name Holsum in favor of Butternut. For months at a time, before defendant's re-entry into the Lansing market area with its Holsum product, which is the gravamen of plaintiff's complaint, retail shelves

in plaintiff's outlets have been bare of its Holsum product. Since defendant's re-entry, plaintiff's Holsum product has re-appeared sporadically. There is no evidence that the plaintiff intends in the future to increase its use of the trade name Holsum, and the plaintiff offered no evidence of legitimate business reasons tending to show a lack of intent to abandon the name."

On appeal to the Michigan Court of Appeals and the Michigan Supreme Court, respondent confined its challenge to the issue of abandonment. The Court of Appeals affirmed the trial court. The Michigan Supreme Court summarily, without oral argument, reversed the lower courts upon being presented with respondent's Delayed Application for Leave to Appeal.

The Michigan Supreme Court's decision makes clear that it incorrectly applied trademark law and did not consider the issues as they were presented to and determined by the trial court. The court stated on page 1 (Appendix A, *infra.*, p. 1a): of its opinion:

"The issue is whether the plaintiff or its predecessor abandoned the 'Holsum' trademark it used for selling bread in the Lansing area."

The court then proceeded to discuss the case exclusively in terms of the abandonment issue. The only attention the court gave to the defensive use issue was in its opaque reference to the case *La Societe Anonyme Parfums le Galion v Jean Patou, Inc.*, 495 F. 2d 1265 (2d Cir. 1974). The court acknowledged that the lower courts had relied on that case in their analysis, but, indicative of the Michigan Supreme Court's confusion about the issue, it distinguished *La Societe* because it did not involve the issue of abandonment. The fact is that *La Societe* was cited by the lower courts not in connection with the abandonment issue but rather for the proposition that, as stated in the trial court's opinion (page 3, Appendix E, *infra.*, p. 15a), "[t]his tactic [defensive use] will not be sanctioned and protected by injunctive relief in a Court of equity."

There is ample legal authority for the principle that, wholly apart from the issue of abandonment, a party who misuses a trademark cannot obtain equitable relief to protect the mark. In addition to *La Societe* the trial court cited *United Drug Co. v Theodore Rectanus Co.*, 248 U.S. 90 (1918) and *Morton Salt Co. v G. S. Suppiger Co.*, 314 U.S. 488 (1941), in support of the principle.¹

The preponderance of the Michigan Supreme Court's opinion was given over to a re-analysis of the evidence presented to the trial court to determine whether that court's collateral finding that respondent had abandoned the "Holsum" trademark was correct. In the Michigan Supreme Court's judgment, made without the benefit of oral argument or the opportunity to observe the key witnesses first hand, the evidence did not support the trial court's finding of abandonment.

The Michigan Supreme Court made no determination as to the propriety of the trial court's finding that respondent's use of the "Holsum" trademark was purely defensive to stifle competition from petitioner. Nor did the court discuss the issue whether a court will grant equitable relief to a party guilty of trademark misuse. The court simply ignored one of the two independent pillars supporting the trial court's decision.

In petitioner's Motion for Rehearing to the Michigan Supreme Court petitioner noted that deficiency in the Supreme Court's opinion and judgment. Petitioner's Motion was denied without explanation. The Jackson Circuit Court Judge, recognizing the flaw in the Supreme Court's judgment, certified a Motion for Clarification, stating in unmistakable terms that the Supreme Court had failed to give consideration to respondent's improper use of the trademark as independent

¹Additional authority includes:

Coca-Cola v. Howard Johnson Co., 386 F. Supp. 330 (N.D. Ga. 1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309 (S.D. N.Y. 1969); *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*, 251 F. Supp. 968 (W.D. Mo. 1966).

grounds for denying it an equitable remedy. Without discussion or explanation the Supreme Court denied the Motion for Clarification.

The Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards, but likewise protects substantive aspects of life, liberty and property. *Kelley v Johnson* 425 U.S. 238 (1976). Although this Court will not ordinarily interfere with merely erroneous state court decisions, the Due Process Clause does afford protection against state court judgments which amount to a mere arbitrary or capricious exercise of power or which are contrary to fundamental principles of justice. *American Railway Express Co. v Kentucky*, 273 U.S. 269 (1927).

In *Cole v State of Arkansas*, 333 U.S. 196 (1948), this Court found that the petitioners had been tried and convicted under one section of the Arkansas penal code and on appeal the state supreme court affirmed the convictions under another section of the penal code, refusing to pass upon the petitioners' federal constitutional challenges to the section under which they were convicted. This Court held that the petitioners' Fourteenth Amendment Due Process Rights had been violated stating:

"To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U.S. 196, 202.

The Michigan Supreme Court reversed the lower court decisions in favor of petitioner without appraising the issues as the case was tried and as the issues were determined in the trial court. Under the decision in *Cole* that constitutes a violation of petitioner's Fourteenth Amendment Due Process Rights.

For the foregoing reasons, petitioner respectfully requests that the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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Date: July 27, 1979

APPENDIX A
STATE OF MICHIGAN
SUPREME COURT

INTERSTATE BRANDS
CORPORATION,
Plaintiff-Appellant,

60905

Filed

October 2,
1978

v
WAY BAKING COMPANY,
Defendant-Appellee.

Per Curiam. This is a trademark infringement case. The issue is whether the plaintiff or its predecessor abandoned the "Holsum" trademark it used for selling bread in the Lansing area.

The Roskam Baking Company began to use the trademark Holsum in the Grand Rapids area in 1945 and entered the Lansing market area in 1960, selling baked goods under several names, including Holsum. Plaintiff Interstate Brands Corporation purchased Roskam's assets in September 1973. At that time Roskam assigned the trademark Holsum to Interstate.

In 1964 defendant Way Baking Company began to use the Holsum trademark in Lansing but withdrew the product on demand of Roskam. Approximately five months after Interstate had acquired the right to the Holsum trademark Way once more commenced selling its Holsum bread in the Lansing market area.

Interstate filed suit in April of 1974 contending that Way was infringing on its right to use the Holsum trademark in the Lansing area. Way responded that Interstate had abandoned the trademark in the Lansing area. Following a non-jury trial in September of 1976, the court issued an opinion favorable to Way. The court perceived the question as: "Is the plaintiff now using the tradename Holsum in the Lansing market area in a good faith commercial endeavor, or is it using the name merely as a competitive defensive measure to

prevent its use there by defendant?" The trial court found that there had been "months at a time" when Interstate's Holsum products had remained off the shelves and that "there is no evidence that the plaintiff intends in the future to increase its use of the tradename Holsum, and the plaintiff offered no evidence of legitimate business reasons tending to show a lack of intent to abandon the name". The court concluded that "the use by plaintiff of the tradename Holsum in the Lansing market area was a defensive competitive measure in order to stifle competition from the defendant".

The Court of Appeals agreed with the trial court and ruled that "the use of a trademark solely for a defensive, negative purpose is insufficient to maintain enforceable rights in that trademark. The trial judge found that plaintiff's use of the 'Holsum' trademark was for defensive purposes to stifle competition. We cannot say his finding was clearly erroneous." 79 Mich App 551, 558; 261 NW2d 84 (1977).

The right to a trademark grows out of its use, and covers the area in which it is used. *United Drug Co v Theodore Rectanus Co*, 248 US 90, 97; 39 S Ct 48; 63 L Ed 141 (1918); *Hanover Star Milling Co v Metcalf*, 240 US 403; 36 S Ct 357; 60 L Ed 713 (1916).

Trademarks may be lost by abandonment. Abandonment is the concurrence of an intention to abandon and an act or omission by which such intention is carried into effect. *Saunders v Stringer*, 265 Mich 301, 305; 251 NW 342 (1933); *Saxlehner v Eisner & Mendelson Co*, 179 US 19; 21 S Ct 7; 45 L Ed 60 (1900).

Both the trial court and the Court of Appeals relied on *La Société Anonyme des Parfums Le Galion v Jean Patou, Inc.*, 495 F2d 1265 (CA 2, 1974), for the proposition that a purely defensive use of a trademark is insufficient to retain enforceable rights in the mark, but in that case the court recognized that abandonment was not in issue:

"Appellee's related argument that it has not legally abandoned the SNOB trademark does not merit much

attention. The issue of abandonment arises only if the defendant has previously acquired rights in the trademark. Essentially plaintiff's challenge here is that Patou has never established any enforceable rights in the SNOB mark and thus has nothing to abandon." 495 F2d 1273, fn 9.¹

There is no question in this case that the name of Roskam and later Interstate was associated with the trademark Holsum, that good will had attached to those companies by the use of the trademark, and that Interstate had acquired the right to use the trademark in the Lansing area.

The question remains whether there was an abandonment. To prove abandonment Way had to show by clear and convincing evidence that Interstate or its predecessor had ceased to use the Holsum trademark with the intent not to resume its use. See 3 Restatement Torts, § 752; MCL 429.31; MSA 18.638(22); McCarthy, Trademarks and Unfair Competition, §§ 17:3-4; Anno: *Trademark or Tradename—Abandonment*, 3 ALR2d 1226. The record indicates that Way failed to sustain its burden of proof and that the trial court's decision was clearly erroneous.

Three witnesses testified at trial. Milton Roskam and Marvin Van Dyke testified for Interstate. William Coan, a former employee of Roskam and Interstate who commenced working for Way as district manager in Lansing, testified for Way.

Coan testified that Roskam had been phasing out the Holsum mark from 1970 to 1973 and that Holsum bread constituted less than 5% of Roskam's sales. Between 1974 and 1976 there would be periods of two to three months when Coan saw no Interstate Holsum bread in Lansing. At the time of the trial, the use of the Holsum trademark by Interstate was reduced to two retail outlets; the action was commenced in April, 1974 and trial was in the fall of 1976.

¹*La Societe* involved a situation where defendant profited about \$100 on the sale of 89 bottles of perfume during a 20-year period. The Court held that the defendant was not using the trademark and had never used or acquired rights in the trademark.

Van Dyke testified that he was the supervisor in the Lansing area from 1973 through July of 1975 for Interstate and that Holsum products were sold in the Lansing area by Interstate during that period. Roskam, the president of Roskam Baking Company, testified that during the period between 1970 and 1973, approximately 1200 units per week of Holsum products were sold in the Lansing area and that considerable sums were expended in advertising the Holsum product.

It is evident that there was no actual abandonment by Interstate. Intermittent periods of nonuse or reduced use do not constitute abandonment. Interstate sells bakery products under various trademarks. Many it acquired from Roskam. The fact that the Holsum trademark constitutes less than 5% of the business does not signify that the trademark is non-existent or abandoned.

Although the volume of business done under a trademark or trade name is reduced, as compared with prior sales or activity, or even as compared to the infringer's sales, that is not abandonment. The reduced continued use is evidence of an intention not to abandon. 87 CJS, Trademarks, § 182, p. 519; 74 Am Jur 2d, Trademarks and Tradenames, § 31, p. 723; Anno, *supra*, p. 1255.

It appears that Way may be correct that Interstate was considering substituting the Butternut label for the Holsum label. Interstate, nevertheless, was still selling Holsum products, had not disassociated itself from that mark, and although it may have been selling fewer Holsum products in the Lansing area than previously, that is not sufficient to constitute abandonment.

Way did not satisfy its burden by testimony from one of Interstate's former employees, hired by Way for the express purpose of taking over its Holsum business, that Interstate was "phasing out" the Holsum mark, without any concrete evidence that it in fact had phased it out to the point of abandonment. His further testimony that at the time of trial the use was minimal, even if true, would not show that, before this action was commenced by Interstate, the mark had been

abandoned by Interstate. Interstate's reduced sales of Holsum bread after the commencement of the action would not constitute abandonment; it may only reflect the competition of Way's infringing use.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the lower courts and remand the case to the Jackson Circuit Court for entry of a judgment in conformity with this opinion.

/s/ Thomas Giles Kavanagh

Blair Moody, Jr.

Charles L. Levin

Mary S. Coleman

G. Mennen Williams

James L. Ryan

John W. Fitzgerald

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of November in the year of our Lord one thousand nine hundred and seventy-eight.

INTERSTATE BRANDS
CORPORATION,

Plaintiff-Appellant,

v

60905

WAY BAKING COMPANY,

Defendant-Appellee.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices
CoA; #31305
LC #74-00750 CZ

In this cause an application for rehearing is considered and is hereby DENIED.

APPENDIX C

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 2nd day of May in the year of our Lord one thousand nine hundred and seventy-nine.

CR 22-216a

INTERSTATE BRANDS
CORPORATION,
Plaintiff-Appellant,

v 60905
WAY BAKING COMPANY,
Defendant-Appellee.

Present the Honorable
MARY S. COLEMAN,
Chief Justice,
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices
COA: 31305
LC: 74-00750CZ

On order of the Court, the motion by plaintiff and appellant for reconsideration of this Court's opinion at 403 Mich 479 (1978) is considered and the motion is DENIED, because it does not appear that said opinion was entered erroneously.

The Jackson County Circuit Court is directed to enter judgment in favor of the plaintiff, including, among other things, an order enjoining the defendant from using the trademark in dispute.

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

INTERSTATE BRANDS
CORPORATION,
Plaintiff-Appellant,

v
WAY BAKING COMPANY,
Defendant-Appellee.

Docket
#31305
November 9,
1977

BEFORE: D. C. Riley, P.J., and J. H. Gillis and R. M. Maher, JJ.

PER CURIAM

Interstate Brands Corporation brought this action to enjoin defendant, Way Baking Company, from using the trademark "Holsum" in a loosely defined area called the Lansing territory and to recover damages for Way's use of that trademark. The trial court, sitting without a jury, found that plaintiff Interstate was using the trademark "Holsum" as a defensive measure to stifle competition from Way and denied the requested relief. Plaintiff appeals the trial court's decision as of right.

In 1929 the W. E. Long Company first registered the "Holsum" trademark in Michigan. It has since been continuously renewed by Long. Defendant Way is a baking company based in Jackson, Michigan. Way began using the "Holsum" mark in Jackson in 1955 as a licensee of Long.

The Roskam Baking Company was plaintiff's predecessor in the Lansing area. Roskam began operations in the Grand Rapids, Michigan area in the 1930's and did not expand outside of the Grand Rapids area till 1960. In approximately 1945, Roskam commenced use of the name "Holsum" to designate its bakery products being sold in Grand Rapids.

In 1949 Roskam attempted to register the trademark in Michigan but registration was refused because defendant's

assignor, W. E. Long, objected on the basis of its prior registration. Later, Long withdrew its objections and permitted registration of the mark by Roskam "in the territory in which Roskam [was then] marketing bread and bakery products under the trade name 'Holsum'," i.e., the Grand Rapids area. The trademark was renewed by Roskam and assigned to Interstate Brands in 1973 when Roskam sold plaintiff all its assets. The registration contained no geographical limits.

Roskam moved into the Lansing area in 1960 and sold, among other brands, Holsum bread, without objection from defendant. In 1964 defendant Way briefly introduced its product in the Lansing market area under the name "Holsum", but withdrew its product after Roskam objected.

In February, 1974, shortly after the sale of assets by Roskam to plaintiff, defendant began selling bread under the "Holsum" brand in the Lansing area. The trial court found that before defendant's re-entry into the Lansing area, from 1970 to 1973, plaintiff had been phasing out the name "Holsum" in favor of the name "Butternut". For those years, the court found, the sale of Holsum bread by Roskam amounted to less than 5% of Roskam's sales. "[After] defendant's re-entry, plaintiff's Holsum bread...reappeared sporadically."

The trial court accepted the version of events given by defendant's witness, a present employee of Way and a former employee of plaintiff's predecessor, Roskam. It found that before defendant's re-entry into the Lansing market area with its Holsum product in 1974, "retail shelves in plaintiff's outlets [had] been bare of its Holsum products.... There is no evidence that plaintiff intends in the future to increase its use of the trade name Holsum, and the plaintiff offered no evidence of legitimate business reasons tending to show a lack of intent to abandon the name."

At the outset, we recognize that the standard by which we review the trial court's findings of fact is contained in GCR 1963, 517.1 which provides:

"Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it."

We must view the trial court's conclusions on trademark usage as findings of fact not to be easily disturbed.

Trademark rights arise out of appropriation and use. Generally, the right belongs to one who first appropriates and uses the mark. *United Drug Company v Rectanus*, 248 US 90; 39 S Ct 48; 63 L Ed 141 (1918). But mere adoption of a particular mark is inadequate. Rights grow out of usage. *Trademark Cases*, 100 US 82; 25 L Ed 550 (1872), *Hanover Star Milling Co v Metcalf*, 240 US 403; 36 S Ct 357; 60 L Ed 713 (1916).

Usage must satisfy good faith requirements. Pretense or pro forma use is not an acceptable substitute for bona fide use. *O'Conner & Gordon, Inc v Handicraft Publications*, 206 Misc 1087; 136 NYS2d 558 (1954). Sham transactions designed merely to satisfy the trademark laws are not acceptable. *Blue Bell, Inc v Jaymar Ruby, Inc*, 497 F2d 433 (2d Cir, 1974).

What constitutes sufficient bona fide use can only be determined on a case by case basis because the equities of each situation must be carefully balanced. See *Chandon Champagne Corp v San Marino Wine Corp*, 335 F2d 531 (2d Cir, 1964). In a particular case, it is the function of the fact finder to balance the equities and determine how a party is making use of a trademark.

The trial court found plaintiff's use of the trademark "Holsum" to be defensive. We realize that in a sense every use of a trademark is defensive. A trademark is a potent weapon in the competitive contest, Callman, *The Law of Unfair Competition, Trademarks, and Monopolies* § 65, p 3 (3d Ed, 1969), which operates as a guarantee to the trademark owner against deprivation of his profit. *Macmahan Pharmacal Co v Denver*

Chemical Mfg Co, 113 F 468 (8th Cir, 1901). It protects the owner's good will against the sale of another's products as his. *United Drug Co v Rectanus*, *supra*, at 97.

While a certain amount of defensive use attaches to every use of a trademark, use of a mark solely for a defensive purpose is not bona fide. The owner of a trademark may not make a negative and merely prohibitive use of a trademark. It confers no monopoly in a proper sense. *United Drug Co v Rectanus*, *supra*, at 97-98. Usage is neither sufficient nor bona fide when contrived for trademark maintenance purposes. The good faith commercial use requirement is inconsistent with a plan of minimal sales devised for a trademark maintenance program. *La Societe Anonyme des Parfums Le Galion v Jean Patou, Inc*, 495 F2d 1265 (2d Cir, 1974).

"Trademark rights are not created by sporadic, casual, and nominal shipments of goods bearing a mark. There must be a trade in the goods sold under the mark or at least an active and public attempt to establish such a trade. Absent these elements no trademark can be created or exist." *Jean Patou*, *supra*, at 1274, citing *Clairol Inc v Holland Hall Products, Inc*, 165 USPQ 214 (Trademark Trial and App Bd, 1970).

In *Jean Patou*, the court determined that any purely defensive use of a trademark is insufficient to obtain enforceable rights in the product.

In a parallel case, *Morton Salt Co v G. S. Suppiger*, 314 US 488; 62 S Ct 402; 86 L Ed 363 (1941), it was held that defensive use of a patent to restrain competition was so adverse to public policy that equity would deny relief. The court stated that misuse of a trademark, that is, a use which subverts public policy, would force a court of equity to deny plaintiff relief in a trademark infringement case.

Because the equities of each case must be balanced individually, it is proper to consider all the purposes a particular trademark serves to ascertain if a defensive use is mingled with a bona fide use. These bona fide uses include the func-

tions of designating goods as the product of a particular trader, providing security to a particular business, and acting as a guarantee against deception of the public.

In this case, the trial court found plaintiff's use to be solely a defensive measure to which there were no counter-balancing bona fide uses. We cannot say that the finding was clearly erroneous. Interstate's sales of Holsum bread were sporadic, the court found, and its Holsum bread was only placed on shelves where defendant sold its product. No bona fide function of a trademark was served. Plaintiff was selling the bread solely as part of a trademark maintenance program designed to stifle competition. Such usage was not in good faith.

Plaintiff attempts to distinguish the instant case on the ground that Interstate Brands was not attempting to make an initial acquisition of rights to a trademark as were the parties in *Jean Patou* and other cited cases. The distinction is of no moment. The acts a party undertakes to establish a trademark and the acts a party undertakes to maintain a trademark are subject to the same requirements of good faith use. It defies logic to hold that a party may not engage in pro forma use to gain the rights initially, but that once those rights are gained, it may rely on pretense as a substitute for bona fide use. Such an absurd rule would be unfair to competitors and to the public. Cases which require bona fide usage do not depend for their holdings upon *when* the trademark is used but upon *how* it is used. A sham usage is unacceptable whether one is trying to acquire trademark rights or to preserve the rights.

We hold that the use of a trademark solely for a defensive, negative purpose is insufficient to maintain enforceable rights in that trademark. The trial judge found that plaintiff's use of the "Holsum" trademark was for defensive purposes to stifle competition. We cannot say his finding was clearly erroneous.

Affirmed. Costs to defendant.

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF
JACKSON

INTERSTATE BRANDS
CORPORATION,

Plaintiff,

vs.

WAY BAKING COMPANY,
Defendant.

OPINION
BY THE
COURT
FILE NO.

74-000750-CZ

The decision in this case turns upon a question of fact, i.e., is the plaintiff now using the trade name Holsum in the Lansing market area in a good faith commercial endeavor, or is it using the name merely as a competitive defensive measure to prevent its use there by defendant. At issue is the right of the defendant to continue to sell bakery products, principally a 20-ounce loaf of white bread, under the name Holsum in the Lansing market area, which is defined approximately as extending from the City of Lansing north to Clare, northeast to Owosso, east to Howell, south to, but not including, Leslie, west to Charlotte and northwest to Ionia.

The name in issue has a long history in the State of Michigan. After having been used for some time, it was first registered in the office of the Michigan Secretary of State in 1929 by the W. E. Long Company, an Illinois corporation, from whom the defendant, through mesne assignors, derives its rights thereto.

In 1949, the Roskam Bakery, plaintiff's assignor, attempted to register the name with the Secretary of State, but its registration was denied because of the existence of previous registrations and renewals filed by defendant and its predecessors. This immediate problem was resolved for Roskam in 1949, when defendant agreed to permit Roskam to use the name in the areas in which Roskam was then marketing bread and bakery products under the trade name Holsum,

being the market area of Grand Rapids and Kalamazoo. There is no evidence that defendant ever introduced its Holsum products into either of these market areas. Later, without objection by defendant, Roskam expanded its market area and between 1960 and 1973 it advertised and sold a 20-ounce loaf of white bread in the Lansing area using the name Holsum. In 1964, defendant briefly introduced its product in the Lansing market area under the name Holsum. This was objected to by Roskam and defendant thereupon withdrew its product bearing that name.

In September, 1973, Roskam sold to plaintiff its bread distribution facilities, including good will, and assigned its right to the trade name Holsum in the Lansing market area. However, plaintiff's white bread, which would compete with defendant's Holsum loaf, has been distributed principally under the trade name Butternut. Defendant distributed only approximately five percent or less of such product using the Holsum name, and there is undisputed evidence that, since taking over Roskam, plaintiff has been phasing out completely the name Holsum in favor of Butternut. For months at a time, before defendant's re-entry into the Lansing market area with its Holsum product, which is the gravamen of plaintiff's complaint, retail shelves in plaintiff's outlets have been bare of its Holsum product. Since defendant's re-entry, plaintiff's Holsum product has reappeared sporadically. There is no evidence that the plaintiff intends in the future to increase its use of the trade name Holsum, and the plaintiff offered no evidence of legitimate business reasons tending to show a lack of intent to abandon the name.

On September 3, 1976, the Friday before a long Labor Day weekend, Mr. William Roan, an agent of the defendant, in a survey of thirty-five of plaintiff's outlets in the Lansing market area, found plaintiff's Holsum bread in only two of the outlets and a total of eleven loaves of plaintiff's Holsum bread for sale on its display racks. While the interest of the person making the survey could render the result suspect, Mr. Roan's figure is neither contradicted nor challenged by plaintiff. The record does not reveal the extent of plaintiff's use of the name Holsum in its other market areas.

The aforesaid William Roan was for several years an employee of Roskam and remained an employee of plaintiff for a few months after the sale to plaintiff in 1973. In February 1974, Mr. Roan went to work for and is still employed by defendant. He has been the principal agent in introducing defendant's Holsum loaf into the Lansing market area.

Price lists submitted by plaintiff to retailers in the defendant's Holsum market area in and around the City of Jackson include Holsum products. There is no evidence of such sales by plaintiff, however, and the Court does not adopt defendant's position that this circumstance soils the plaintiff's hands to the extent that it is unable to seek equitable relief. The Court further finds that evidence that plaintiff's activities may be in violation of an order of the Federal District Court is so inclusive that plaintiff's hands are not thereby rendered unclean.

Based upon the above findings, it is the further finding of the Court that the use by plaintiff of the trade name Holsum in the Lansing market area was a defensive competitive measure in order to stifle competition from the defendant. This tactic will not be sanctioned and protected by injunctive relief in a Court of equity. The Court is persuaded to such conclusion by the following cases: *LaSociete Anonyme des Parfums le Galion v Jean Patou, Inc.*, 181 USPQ 545 (2 Cir, 1974); *United Drug Company v Theodore Rectanus Company*, 248 US 90 (1918); *Morton Salt Company v G. S. Suppiger Company*, 314 US 488 (1941).

Plaintiff's complaint shall, therefore, be dismissed. Defendant may tax costs.

/s/ Russell E. Noble, Circuit Judge

Dated: October 26, 1976

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF
JACKSON

INTERSTATE BRANDS
CORPORATION,

Plaintiff,

File No.
74-000750-CZ

v

WAY BAKING COMPANY,
Defendant.

JUDGMENT

At a session of said court held in the County Building, Jackson, Michigan on November 19, 1976.

PRESENT: Hon. Russell E. Noble
Presiding Judge

Interstate Brands Corporation, the plaintiff ("Interstate"), brought this action to enjoin the use by Way Baking Company, the defendant ("Way"), of the trademark "Holsum" in an area (the "Trade Territory") defined by Interstate as follows: From the City of Lansing north to Clare, northeast to Owosso, east to Howell, south to, but not including Leslie, west to Charlotte and northwest to Ionia, all in the state of Michigan.

Way interposed various defenses, and the matter was brought on for trial and tried to a conclusion on September 8, 1976. At issue is the right of Way to sell bakery products under the Holsum name in the Trade Territory. The court has issued its Opinion following trial.

This court is advised in the premises.

NOW THEREFORE, IT IS ORDERED that judgment is entered that Way may sell bakery products under the Holsum name in the Trade Territory.

FURTHER ORDERED, that judgment is entered that Interstate has abandoned the trademark "Holsum" in the Trade Territory.

FURTHER ORDERED, that Judgment is entered that Interstate's use of the trademark Holsum in the Trade Territory has been defensive and for the purpose of stifling competition.

FURTHER ORDERED, that judgment is entered that the complaint is dismissed with prejudice.

FURTHER ORDERED, that judgment is entered in favor of Way and against Interstate in the amount of \$330.85 for costs and attorneys' fees.

/s/ Russell E. Noble

Judge of Circuit Court

APPENDIX G

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

INTERSTATE BRANDS
CORPORATION,

Plaintiff,

File No.

74-000750-CZ

vs.

WAY BAKING COMPANY,

Defendant.

JUDGMENT

At a session of said court held in the Courthouse
in the City of Jackson, Michigan on May 18,
1979.

PRESENT: Hon. Russell E. Noble
Presiding Judge

The prior Decision of this court as indicated in the Opinion dated October 26, 1976 and the Judgment entered November 19, 1976, and the Affirming Decision of the Court of Appeals dated November 9, 1977 (Docket 31305) have been reversed by a Decision of the Supreme Court of Michigan dated October 2, 1978 (Docket 60905), and this action has been remanded to this court for the entry of a judgment in favor of Interstate Brands Corporation in conformity with the Supreme Court Opinion. This court is advised in the premises.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. That the judgment of the court entered in this action on November 19, 1976 be and is hereby vacated and replaced by this judgment.

2. The geographic area to which the judgment relates is defined as: from the City of Lansing north to Clare, northeast to Owosso, east to Howell, south to, but not including, Leslie, west to Charlotte and northwest to Ionia.

3. Way Baking Company is enjoined from using in any manner whatsoever the trademark Holsum in connection with bakery products in the area defined in paragraph 2 of this judgment for so long as the right to use the Holsum trademark remains the exclusive right of Interstate Brands Corporation.

/s/ Russell E. Noble

Judge of Circuit Court

AUG 27 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-141

WAY BAKING COMPANY,
Petitioner,

vs.

INTERSTATE BRANDS CORPORATION,
Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT**

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-141

WAY BAKING COMPANY,
Petitioner,

vs.

INTERSTATE BRANDS CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

OPINIONS BELOW

The opinion of the Michigan Supreme Court, of which review is sought by the Petitioner, is before this Court as Appendix A to the Petition and is reported at 403 Mich. 479, 270 NW2d 103. The decision was filed on October 2, 1978.

On October 19, 1978 Petitioner filed a Motion for Rehearing in the action, supported by a full Brief. This motion was denied by an order of the Michigan Supreme Court entered November 21, 1978. A copy of the Order appears as Appendix B, of the Petition. Such Order was not reported.

On January 22, 1979 Petitioner filed a Motion for Clarification of Opinion, supported by a full Brief, seeking to have the Michigan Supreme Court reconsider and clarify its opinion of October 2, 1978. This Motion was denied by an Order entered May 2, 1979. A copy of the Order appears as Appendix C, of the Petition. Such Order was not reported.

The opinion of the Michigan Court of Appeals is reported at 79 Mich. App. 551, 261 NW2d 84. A copy of this decision appears as Appendix D, of the Petition.

Copies of the original opinion and judgment of the Circuit Court of Jackson County, Michigan, appear as Appendixes E and F, respectively, of the Petition. Neither was reported.

Upon remand of the case, from the Michigan Supreme Court to the Circuit Court, a Judgment for Respondent was ultimately entered on May 18, 1979, not reported, a copy appearing as Appendix G, of the Petition.

JURISDICTION

Petitioner would allege jurisdiction under the provisions of 28 USC 1257(3). If jurisdiction possibly exists, it hangs by the thread of a single paragraph in Petitioner's Motion for Rehearing to the Michigan Supreme Court alleging violation of Petitioner's "rights to due process and equal protection of the laws" and by three paragraphs of argument in its Brief in Support of Motion for Rehearing wherein it argued that Petitioner's rights under the U. S. Constitution had been denied by the Court's failure to give notice to the parties prior to reaching a decision and by failing to provide an opportunity for, and to hear, oral argument.

It is submitted that such a reference to an alleged "federal question" is not sufficient to give this Court jurisdiction in a case originally initiated on the basis of State law and which proceeded on that basis through the entire Court system of the State of Michigan, without so much as a suggestion that a federal question was involved. Such a suggestion was raised only after Petitioner had lost its case in the Michigan Supreme Court and it was then and only then that Petitioner felt that it had allegedly been denied due process.

Further, Respondent does not find, in the Petition, sufficient compliance with Rule 23 1(f) of this Court to indicate that any federal question is involved which would justify review, by this Court, of the decision of the Michigan Supreme Court, which decision turned entirely upon the application of State law to a rather straightforward, simple question of whether or not a trademark had been abandoned. Surely, even if jurisdiction could be found to exist, the alleged federal questions belatedly raised by Petitioner are not of sufficient merit or substance, under the provisions of Rule 19 of this Court, to justify the granting of the Petition.

"The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actively entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

The alleged "federal questions" now raised by Petitioner were brought into this case for the first time by its Motion for Rehearing directed to the Michigan Supreme Court. That Court did not entertain and decide the alleged federal question but rather denied the Motion for Rehearing.

Nor can Petitioner be said to have timely raised the alleged federal question by its Motion for Rehearing on the grounds that the decision of the Michigan Supreme Court could not have been anticipated or was unexpected. The Rules under which the Court proceeded (Michigan General Court Rules of 1963) have been in effect for many years and several cases have been decided pursuant to the very provision of which Petitioner now complains (Rule 853.2(4)). See for instance, *In Matter of Kidder*, 395 Mich. 51, 232 NW2d 672 (1975); *People v. Springer*, 396 Mich. 116, 240 NW2d 205 (1976); *American Electrical Steel Co. v. Scarpace*, 399 Mich. 306, 249 NW2d 79 (1976); and also the similar cases of *O'Brien v. City of Detroit Election Commission*, 383 Mich. 707, 179 NW2d 19 (1970); and *People v. Harrington*, 387 Mich. 771, 196 NW2d 129 (1972) decided under similar Michigan Court Rule 852.2 (4)(g) permitting the Supreme Court to enter a final judgment or peremptory order prior to a decision of the Court of Appeals.

Thus, it is submitted that this Court does not have jurisdiction to review the judgment of the Michigan Supreme Court since no substantial federal question was timely raised and decided by that Court and, therefore, the Petition must be denied on jurisdictional grounds alone.

QUESTIONS PRESENTED

In an effort to persuade this Court that federal questions are allegedly involved, in a very ordinary State Court action for trademark infringement and unfair competition, which ultimately turned on the question of whether Respondent had abandoned the trademark "HOLSUM" in the Lansing, Michigan area, Petitioner has urged, in its first two "Questions Presented" that it was denied due process because (1) Petitioner was not given adequate

notice that a decision on the merits would be rendered on Respondent's delayed application for leave to appeal and (2) Petitioner was not given an opportunity for oral argument before the Michigan Supreme Court. Petitioner's third question presented goes to the factual and legal merits of the case and would seek to have this Court entertain the case for the purpose of overruling the Michigan Supreme Court decision as clearly erroneous.

Therefore, Petitioner actually seeks initially, to attack the Court Rules under which the Michigan Supreme Court has operated for many years and secondly seeks to have this Court review the merits of the case and determine if the lower decision was clearly erroneous.

Accordingly, the "Questions Presented" might be more aptly stated as:

- (1) Was the manner of procedure followed by the Michigan Supreme Court, pursuant to its established rules, such as to violate the due process rights of Petitioner;
- (2) Was the decision of the Michigan Supreme Court, on the merits of the case clearly erroneous, so as to justify review by this Court.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

While it never appeared in this case prior to Petitioner's Motion for Rehearing to the Michigan Supreme Court, it is now urged that the due process clause of the U. S. Constitution, Amendment XIV, §1 is involved.

Contrary to Petitioner's urging, Respondent does not believe that this case truly involves any federal question; that is, any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

The Michigan General Court Rules of 1963 are involved to the extent that Petitioner urges that, by the Michigan Supreme Court following such Rules, it was deprived of due process. The Rule involved is Rule 853 and various subsections thereof.

STATEMENT OF THE CASE

Respondent, Interstate Brand Corporation, owner of the trademark "HOLSUM" for bakery products in the Lansing, Michigan trade area, by virtue of long use of the mark by it and its predecessor, instituted this action in the Circuit Court of Jackson County, Michigan to enjoin the invasion of the Lansing trade territory by Petitioner, Way Baking Company, using the trademark "HOLSUM" for its bakery products. The case was tried to the Court, without a jury, and both sides made a presentation of witnesses and documentary evidence.

The Court held that Interstate had abandoned the trademark "HOLSUM" in the trade territory, notwithstanding a further finding that Interstate's use of the mark, in the territory, was a defensive use. Accordingly, the complaint was dismissed.

Interstate felt that the decision of the Circuit Court was in error, since it seemed legally improper for the Court to recognize that it was using the mark, on one hand, and, on the other hand, hold that the mark had been abandoned because of non-use. Accordingly, an appeal was taken to the State of Michigan Court of Appeals.

The Court of Appeals, proceeding pursuant to the Michigan General Court Rules of 1963, Section 517.1, stated that it could not say that the findings of fact of the trial Court were clearly erroneous and, therefore, affirmed such findings.

Respondent, Interstate, then proceeded, pursuant to Michigan General Court Rule 853.2(3), to perfect a delayed application for leave to appeal to the Michigan Supreme Court. This took the form of the following pleadings: Motion for Delayed Application for Leave to Appeal; Affidavit in Support of the Motion; Notice of Hearing on the Motion; and Brief in Support of the Motion, which brief fully argued the merits of the case on appeal, pursuant to Michigan General Rules of Court 853.2.

Specifically, said Rule 853.2(1) provides, in pertinent part, that:

"Application for leave to appeal and brief in support thereof shall be filed in form and manner and proceedings had thereon as provided in subrule 852.2. Each copy of the application for leave to appeal shall be accompanied by a copy of the opinion and order of the Court of Appeals and the opinion, order and findings of the trial court or other tribunal."

It is also important to note that the same Rule 853.2(1) requires that:

"The filing of a copy of an application for leave to appeal to the Supreme Court with the clerk of the Court of Appeals shall constitute notice to the clerk of the Court of Appeals to forward to the clerk of the Supreme Court the record on file with the Court of Appeals."

Accordingly, a full transcript of the record from both Courts below, together with Exhibits, was furnished to the Michigan Supreme Court at the time of filing Interstate's application for leave to appeal. As a matter of fact, the Office of Clerk of the Michigan Supreme Court has verified the presence of such transcript and exhibits

and stands ready to certify and forward a copy thereof, if requested.

Upon being served with the aforementioned pleadings of Interstate, Petitioner Way, by way of response, then filed, with the Michigan Supreme Court, two documents, namely a "Brief in Opposition to Appellant's Delayed Application for Leave to Appeal" and fully incorporated therein, by reference, the twenty-five page Brief Petitioner had filed with the Court of Appeals and in which the merits of the case on appeal were fully presented and argued.

Specifically, this Brief of Petitioner to the Court of Appeals, copies of which were filed with the Michigan Supreme Court, was a full Brief on all of the issues presented, was specifically advanced as being responsive to Respondent's Brief on Appeal to the Michigan Supreme Court and, as exemplary of the issues treated, set forth a table of contents reading as follows:

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

COUNTER-STATEMENT OF FACTS ARGUMENT

- I. The facts of abandonment and defensive use have been conclusively established.
 - A. Interstate's appeal is addressed to issues of fact rather than issues of law.
 - B. A finding of defensive use is consistent with a finding of abandonment.
 - C. The findings of fact by the trial court cannot be set aside.

- II. Interstate has abandoned the Holsum trademark.
 - A. A trademark may be abandoned.
 - B. Interstate discontinued use of the Holsum trademark.
 - C. Interstate has no intent to resume use of the Holsum trademark.
 - D. Use in some geographic areas does not qualify as use worldwide.
- III. Interstate has used the trademark defensively and improperly.
 - A. Interstate incorrectly assumes that any use of a trademark is proper and protectable.
 - B. The facts indicate that Interstate has used its trademark defensively.
 - C. Defensive use is not protected as a matter of trademark law.
 - D. The cases cited in Section C apply to the present situation.
 - E. Interstate has improperly used the Holsum trademark in other areas.
 1. Interstate has violated Way's trademark rights.
 2. Interstate has exceeded its authority to use the trademark Holsum.
 3. Interstate's predecessor has wrongfully used the trademark Holsum in the state of Michigan.
- IV. A summary of parts II and III
- V. Conclusion

RELIEF

Petitioner's Briefs to the Michigan Supreme Court were dated February 1, 1978. Thus, as of said date the Court had before it full and complete briefs by both parties, presenting and arguing the issues on appeal.

On October 2, 1978 the Michigan Supreme Court decided the matter and, in lieu of granting leave to appeal, and proceeding pursuant to its Rule 853.2(4), reversed the judgments of the lower courts and remanded the case to the Jackson County Circuit Court for entry of a judgment in conformity with its opinion.

Petitioner then filed a Motion for Rehearing and Brief in Support Thereof, which Motion was denied November 21, 1978. After this denial Petitioner filed a Motion for Clarification of Opinion, which Motion was denied May 2, 1979. Subsequently a judgment of the Circuit Court of Jackson County was entered on May 18, 1979 enjoining Way from using the trademark "HOLSUM" in the Lansing area.

ARGUMENT

Why the Writ Should Not Be Granted

Introduction

Petitioner lost, on appeal to the Michigan Supreme Court, a trademark infringement case which ultimately turned on the question of abandonment. A proper decision, under the facts and the law, was made by the highest Court of the State. There was no decision on a federal question and it is not believed that such a question is now presented for this Court to even acquire jurisdiction.

Petitioner had its day in Court, in full accord with all applicable rules, and was not in any way denied the procedures of due process, having had an opportunity to fully present its case. The decision on the merits of the case was not erroneous and was in accord with applicable decisions.

There are no special or important reasons for granting the writ (Rule 19).

I. Petitioner's Due Process Rights Were Not Violated by Procedure Followed by the Michigan Supreme Court in Deciding the Issues on Appeal.

In view of the argument presented by Petitioner, it is illuminating to read in their entirety, *in sequential context*, the rules under attack. Specifically they are as follows:

"Rule 853 Appeals from Decisions of Court of Appeals.

.1 Grounds. Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any

decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal.

.2 Application for Leave To Appeal.

(1) Application for leave to appeal to the Supreme Court shall be filed with the clerk of the Supreme Court within 20 days after mailing by clerk of the Court of Appeals of notice to counsel of entry of the order of the Court of Appeals or the denial of an application for rehearing timely filed. Application for leave to appeal and brief in support thereof shall be filed in form and manner and proceedings had thereon as provided in sub-rule 852.2. Each copy of the application for leave to appeal shall be accompanied by a copy of the opinion and order of the Court of Appeals and the opinion, order and finding of the trial court or other tribunal. The filing of a copy of an application for leave to appeal to the Supreme Court with the clerk of the Court of Appeals shall constitute notice to the clerk of the Court of

Appeals to forward to the clerk of the Supreme Court the record on file with the Court of Appeals.

(3) Delayed application for leave to appeal may be filed upon a showing by affidavit of facts that the delay was not due to appellant's culpable negligence but no such application shall be filed later than six months after the decision of the Court of Appeals.

(4) Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order."

Note that Rule 853.2(4) specifically provides that: "Upon *any* application for leave to appeal . . ."

Clearly this is intended to apply to either a "regular" application to appeal under Rule 853.2(1) or a delayed application for leave to appeal under Rule 853.2(3) for it follows, in sequence, both of said rules.

Note also that the rules provide for a brief in support of the leave to appeal, whether it be regular or delayed, and also provide for the Supreme Court to have before it the record on file with the Court of Appeals, as well as the opinions from all Courts below.

As heretofore pointed out, the Petitioner fully briefed all issues on appeal in a separate, twenty-five page brief filed *in addition* to its brief in opposition to Respondent's delayed application for leave to appeal.

Thus, all issues were fully briefed and presented to the Michigan Supreme Court, it had the benefit of the entire transcript of record below, including exhibits, as well as copies of the decisions below.

The Court considered the case from February to October of 1978 before reaching its decision. The Court

rules are clear and proper and the Court clearly had the discretion to proceed as it did.

There is no requirement in the Michigan General Court Rules for notice to be given that the Supreme Court is about to make a decision and, indeed, none is required. The Petitioner had fully presented its position to the Court and it was, as are all other Courts, permitted to make a ruling in its own time and at its discretion, pursuant to the Court's established rules.

The procedure which the Michigan Supreme Court may follow in a given case is clearly spelled out in the Rules and Petitioner was upon notice that such procedure was available. Further Petitioner should not have been surprised by the Court following the procedure of well defined Rule 853.2(4) for, as noted hereinabove, the Court had done so in many previous cases.

The right of State Courts to establish and follow rules of appellate procedure is well established. See *Wolfe v. North Carolina*, 364 U.S. 177 (1960) holding:

"Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon the questions of local or general law."

See also *John v. Paullin*, 231 U.S. 583 (1913).

Petitioner would also make much of the fact that no oral argument was called for by the Michigan Supreme Court, indicating this as a denial of due process. Such argument of Petitioner has no merit. See *Price v. John-*

son, 334 U.S. 266 (1948), enunciating the well settled rule that "oral argument is not an essential ingredient of due process." See also *Federal Communications Commission v. Station WJR*, 337 U.S. 265 (1949).

The fact that Petitioner was not given the opportunity to present oral argument did not deprive it of due process. This is particularly true when the Court had before it not only the entire record in the case, but also full briefs from both parties on all issues.

Thus, as all properly established procedural rules of the Michigan Supreme Court were fully followed, there can be no denial of due process to Petitioner.

II. The Decision of the Michigan Supreme Court Was Proper in Reversing the Erroneous Decisions of the Lower Courts.

With the complete record before it, including full briefs by both parties covering all issues involved, the Michigan Supreme Court, in a per curiam decision, found that Respondent had not in fact abandoned the trademark "HOLSUM" in the Lansing area. This was an inevitable conclusion since both Courts below had found that Respondent was actually using the mark in the area. The Court correctly recognized that "To prove abandonment Way had to show by clear and convincing evidence that Interstate or its predecessor had ceased to use the 'HOLSUM' trademark with intent not to resume its use" and then concluded "The record indicates that Way failed to sustain its burden of proof and that the trial court's decision was clearly erroneous."

This conclusion is in accord with the facts and the law of Michigan as enunciated previously by its Supreme Court in *Saunders v. Stringer*, 265 Mich. 301, 251 NW 342 (1933) as follows:

"Abandonment must, however, be strictly proven where a forfeiture is claimed on that ground. The temporary disuse of a trade-name, or even the temporary use of an additional trade-name in connection with it, is not sufficient. It is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon, since acts which, unexplained, would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed."

Having found no abandonment of its mark by Respondent, the Michigan Supreme Court also fully considered and disposed of the issue of alleged defensive use advanced by Petitioner, by correctly interpreting the case of *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (CA 2 1974) which had been relied upon by the Courts below as a basis for their decisions on the issue. The Supreme Court of Michigan properly recognized that the *Patou* case did not relate to the question of abandonment of a mark which had been in use, but rather dealt with the initial acquisition of a trademark. So saying, the Court disposed of the issue by concluding that: "Interstate had acquired the right to use the trademark in the Lansing area."

The conclusion of the Michigan Supreme Court was proper and is not contradicted by *United Drug Company v. Theodore Rectanus Company*, 248 U.S. 90 (1918) which also deals with the question of sufficient initial use of a trademark in a given territory to acquire rights to the mark and, as a matter of law, supports the position of the Court by holding "Undoubtedly, the general rule is that, as between conflicting claimants to the right to use of the same mark, priority of appropriation determines

the question"; or by *Morton Salt Company v. G. S. Suppiger Co.*, 314 U.S. 488 (1941) which is an irrelevant patent case involving an accounting for infringement of a patent and holding that the patentee had violated public policy in attempted enforcement of its patent.

The decision of the Michigan Supreme Court on the merits of the case was not erroneous, and even if it were, such would not admit Petitioner to this Court on the grounds of denial of due process. See *American Railway Express Co. v. Kentucky*, 273 U.S. 269 (1927) stating:

"Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.'

"It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

The decision of the Michigan Supreme Court was proper, took into consideration all relevant issues and did not, in any manner, deprive Petitioner of its rights under the law and the rules. As noted above and recognized by Petitioner in its Petition, this Court will not normally interfere with state court decisions (Pet. p. 16). There is nothing in the present case to justify this Court becoming involved in a State action for trademark infringement, which action has been fully and properly presented to, and decided by, the highest Court of the State involved.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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